Supreme Court, U.S.
FILED (1)

96 697 OCT 28 1996

NO. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

KEITHIAN L. ARNOLD,
PETITIONER,

VS.

BOATMEN'S NATIONAL BANK
OF BELLEVILLE,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KEITHIAN L. ARNOLD
4414 CASEYVILLE AVE.
APT. # 6
EAST ST. LOUIS,
ILLINOIS 62204-1923
618/874-7987

PRO SE PETITIONER

43 pp

I. QUESTIONS FOR REVIEW

1. Does Boatmen's claim an employee relations manager failed to give a copy of my complaint to in-house counsel meet the requirement of Federal Rules of Civil Procedure (F.R.C.P.) 6(b)(2) that excusable neglect be shown for Boatmen's to avoid judgment by default under the Summons In A Civil Action an F.R.C.P. 12(a); 54(c); and 55(a), (b)(2), and (d)?

2. Does my demonstration that Boatmen's attempted to conceal jobs from the court, excluded Black males from its hirees, and left itself with no defense by ignoring court discovery rules show that I shouldn't have had summary judgment entered against me (but probably instead entered for me) under 42 U.S.C. §1981 and §2000e [especially §2000e-(m)] and I should have been appointed counsel?

II. OPINIONS BELOW

The U. S. district court granted Boatmen's request for an extension to respond to the complaint, denied my motions to reconsider this extension, denied my motion for judgment by default, and granted Boatmen's motion for summary judgment. The appellate court affirmed the summary judgment and denied my petition for rehearing. All these orders and Boatmen's extension motion are appended.

III. JURISDICTION

The appellate court's judgment was dated June 25, 1996. The appellate court's order denying rehearing with in banc suggestion was dated July 30, 1996. This court has jurisdiction under 28 U.S.C. §1254(1).

IV. RULES

See appendix.

V. STATEMENT OF THE CASE

This case is based on race, sex, and retaliation employment discrimination for Boatmen's refusals to hire me under 42 U.S.C.

§2000e and 42 U.S.C. §1981. The district court denied my motion for counsel and motion to reconsider. The U.S. Marshals served the summons and complaint on Boatmen's on June 14, 1994. I motioned for judgment by default on July 15, 1994 because Boatmen's had until July 5, 1994 to respond but hadn't. Boatmen's motioned for an extension to respond claiming the Bellevile Bank, a subsidiary, forwarded my complaint to an employee relations manager at its holding company who caused the delay because her pending resignation, wedding, and relocation kept her from giving my complaint to in-house counsel. The district court granted the extension, denied default judgment, and denied my motions to reconsider default. The district courts never stated that excusable neglect was shown. Boatmen's failed to comply with the court's discovery order, propounded no interrogatories, properly requested no documents, and initially answered the court's

interrogatories incompletely. I stated Boatmen's hiring two apparently Black females but excluding Black males without showing a business necessity for this exclusion is a violation of 42 U.S.C. §2000e.

VI. REASONS FOR GRANTING THE WRIT

A pending resignation, wedding, and relocation are not sufficient to prevent someone Boatmen's trusts to be a manager from performing the small task of forwarding my complaint to in-house counsel which is all the human resources manager could do with it. Neither the federal rules, summons, nor service forms request an individual's name for service. If I had named someone, it would have had to been someone at the subsidiary, and Boatmen's just would have claimed that named individual forwarded my complaint to the same human resources manager at the holding company and she caused the delay because she was Boatmen's scapegoat. Therefore, excusable neglect was not shown and F.R.C.P. 6(b)(2) is not

satisfied.

I showed evidence of disparate impact on Black males and should at least have been appointed counsel. However, the motion for summary judgment is moot because I should receive judgment by default.

DATE: OCTOBER 28, 1996

Submitted by,

Keithian L. Arnold

KEITHIAN L. ARNOLD
PRO SE PETITIONER

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted June 25, 1996

Decided June 25, 1996

HON. WALTER J. CUMMINGS, Circuit Judge

HON. WILBUR F. PELL, JR., Circuit Jugdge

HON. JOEL M. FLAUM, Circuit Judge

KEITHIAN L. ARNOLD
Plaintiff- Appellant

No. 95-2223 v.

BOATMEN'S NATIONAL BANK OF BELLEVILLE,
Defandant-Appelle.

Appeal from the United States District Court for the Southern District of Illinois, East St. Louis Division

] No. 94 C 94

Paul E. Riley,
Judge

ORDER

The district court granted the defendant's, Boatmen's National Bank ("BNB"), motion for summary judgment on plaintiff's, Keithian Arnold ("Arnold"), racial and sexual discrimination claims brought pursuant to 42 U.S.C. 1981 and 42 U.S.C. 2000(e), et seq. ("Title VII"). Arnold appeals the summary judgment and the district court's denial of his motion for a default judgment. Because the district court did not abuse its discretion in denying Arnold's motion for a default judgment and since Arnold failed to

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After an examination of the briefs and the record, we have concluded that oral argument is unnecessary and the appeal is submitted on the briefs and record. See Fed. R. App. P. 34(a); Cir. R. 34(f)

APPENDIX A

show a material issue of act precluding summary judgment of his discrimination claims, we affirm.

On February 4, 1994, Arnold filed a complaint alleging that BNB discriminated against him by refusing to hire him on account of his race and his sex. He also claimed that BNB retaliated against him for filing an earlier lawsuit against another subsidiary of BNB's parent company. (Def. Br. at 4). On July 15, 1994, ten days after BNB's answer was due pursuant to Federal Rule of Civil Procedure 12(a), Arnold filed a motion for default judgment against BNB for its failure to file a timely responsive pleading. The district court denied this motion after granting BNB's motion for additional time within which to answer the complaint. (R. at 24). In subsequently denying Arnold's motion to reconsider, the court noted that BNB timely complied with the court-ordering filing deadline.

In his second motion for reconsideration, Arnold argued that BNB failed to show "excusable neglect" for its tardiness. BNB responded that its failure to timely file its answer should be excused since the complaint was not originally sent to an authorized agent (for receiving process) of the company and then after it was forwarded to the human resources department, an employee (being preoccupied with getting married, resigning, and moving) failed to promptly re-direct it to the department's in-house counsel. BNB'S filed its answer one day after its in-house counsel became aware of the complaint, ten days after it was due. (Def's Br. at 7). Finding that BNB demonstrated "excusable neglect" for failing to timely answer and that Arnold had not been substantially prejudiced by the delay, the court again denied the motion (R. at 29). Likewise, the course refused to grant Arnold relief in his third (R. at 32) and fourth motions to reconsider (R. at 41), again noting Boatmen's excusable neglect, lack of prejudice to Arnold, and Arnold's failure to identify any clear error of law or new evidence that would warrant reconsideration.

Federal Rule of Civil Procedure (12(a) requires a defendant to file an answer within twenty days after the service of the summons and complaint; the failure to do so may result in the defendant';s default under Federal Rule of

Civil Procedure 55(a). The decision to enter default lies within the district court's discretion. *Silva v. City of Madison,* 69 F.3D 1368, 1377 (7TH CIR. 1995); *O'Brien v. R.J. O'Brient & Assoc., Inc.,* 998 F.2d 1394, 1398 (7th Cir. 1993). A district court does not abuse its discretion in granting a party an enlargement of time to file a pleading if the party demonstrates "excusable neglect" for its delay. *See* Fed. R. Civ. P. 6(b). Indeed, in the absence of excusable neglect, we have not hesitated to affirm the entry of default judgments: *see Pretzel & Stouffer v. Imperial Adjusters, Inc.,* 28 F.3d 42 (7th Cir. 1994) (failure to ever file an answer or attend status hearing); *O'Brien, supra,* 998 F.2d at 1398 (failure to file an answer for seventeen months); *In re State Exchange Finance Co.,* 896 F.2d 1104, 1106 (7th Cir. 1990) (noting that federal courts no longer strongly disfavor default judgments and entering default against defendant who evaded service of process, filed a late answer, and filed frivolous appeals concerning personal jurisdiction). A review of such cases shows that relief under the "excusable neglect" standard may be granted only "where the actions leading to the default were not willful, careless, or negligent'," *Johnson v. Gudmundsson, 35 F.3d* 35 F.3D 1104, 1117 (7th Cir. 1994) (citation omitted).

As previously noted, BNB's responsive pleading was filed ten days late but only one day after its in-house counsel became aware of the complaint. Although Arnold sought reconsideration of district court's extension four times, he did not present any evidence showing that BNB's tardiness was due to willfulness, carelessness, or negligence. BNB argued

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[1] Apparently, BNB waived any personal jurisdiction arguments it might have had based on improper service and instead chose to argue that the improper service supported its motion for an extension of time to file an answer.

(and Arnold did not dispute) that at least part of its delay was due to Arnold's failure to serve an authorized agent of the company. Even assuming that one of BNB's employees was negligent in paying more attention to wedding planning than to business-at-hand, Arnold contributed to the delay failing to name the appropriate individual to receive service. Moreover, unlike several of the cases where we affirmed default judgments, BNB did not attempt to evade service and did not unduly neglect its duty to file a responsive pleading. Under these circumstances presented to the district court, we find no abuse of discretion in denying Arnold's motion for default judgment.

In order to survive BNB's motion for summary judgment, Arnold must show through specific evidence that an issue of material fact remains on matters for which he bears the burden of proof at trial. *Walker v. Shanksky,* 28 F.3D 666, 670-71 (7th Cir. 1994), citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). The district court held that Arnold failed to show a prima facie case of discrimination under Title VII or §1981, both of which require proof of intentional discrimination. *See Von Zuckerstein v. Argonne National Labs.,* 984 F.2d 1467, 1472 (7th Cir. 1993). The district court found that Arnold failed to show that he was qualified for the accounting position he sought or that he was rejected despite his qualifications.[2] (R. at 41, A-4). The court also opined that Arnold failed to illustrate facts giving rise to an inference of unlawful discrimination. *Id.* AT A-5. The court reasoned that no unlawful intent to discriminate was shown by BNB's practice of hiring experienced internal candidates in its accounting department at a time when Arnold's employment application was not active, when BNB did not solicit any outside applicants, and when Arnold's unsolicited application did not evidence his qualifications for the job openings. *Id.* Moreover, the court stated that even if

Arnold had established a prima facie case of discrimination, summary judgment was proper since Arnold failed to rebut the legitimate, nondiscriminatory reasons (that Arnold's skills and work experience were inferior to those persons hired for the open positions) which supported BNB's hiring decisions. *Id.* AT A-6 n.5.

Arnold's sole argument on appeal of the summary judgment is that the district court should have denied the motion because "[he] showed the district court Boatmen's violated (by ignoring) the court's discovery order leaving itself with no defense...[and that he] showed the disparate impact on Black males which was Boatmen's excluding us (Black males) from its hirees..." (Pl.'s Br. at 9). In our *de novo* review -- which does not require us to research and construct facts and legal arguments available to the parties, *In re Maurice,* 21 F .3d 767, 774 (7th Cir. 1994); *Pelfrense v. Village of Williams Bay,* 917 F.2d 1017, 1023 (7th Cir. 1990) -- we find no evidenceto support these self-serving conclusions. Accordingly, because Arnold has not satisfied his burden under *Celotex,* we AFFIRM the judgment of the district court granting BNB's motion for summary judgment.

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[2] Arnold's complaint also alleged that BNB discriminated against him by not hiring him for any position at all. The district court held that this claim was beyond the scope of Arnold's EEOC charge and could not be raised under Title VII.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT- WITHOUT ORAL ARGUMENT

Date: June 25,, 1996

Before: HON. WALTER J. CUMMINGS, Circuit Judge

HON. WILBUR F. PELL, JR., Circuit Judge

HON. JOEL M. FLAUM, Circuit Judge

No. 95-2223

KEITHIAN L. ARNOLD,
Plaintiff - Appellant

v.

BOATMEN'S NATIONAL BANK OF BELLEVILLE,
Defendant - Appellee

Appeal from the United States District Court for the Southern District of Illinois, East St. Louis Division No. 94 C 94, Paul E. Riley, Sr., Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

(1060-110393)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

KEITHIAN L. ARNOLD,	]
	]
Plaintiff	]
	]
	]No. 94 94 WLB
-VS-	]
	]
BOATMEN'S NATIONAL BANK	]
OF BELLEVILLE,	]
Defendant	]

ORDER

This matter is before the Plaintiff's Second Motion to Waive Fee for copies, (Doc. 11), and Motion for Appointment of Counsel, (Doc. 10). On March 2, 1994, this court denied the Plaintiff's previous motions for copies and for appointment of counsel. The Plaintiff asks the court to again consider both motions.

Originally, the court denied the Plaintiff's request for appointed counsel because the Plaintiff failed to advise the court that he had made reasonable efforts to retain counsel, pursuant to Jackson v. County of McClean, 953 F.2d 1070,1073 (7th Cir. 1992). The current motion before the court lists the attorney with whom the Plaintiff has consulted in an effort to retain counsel. Because the Plaintiff was unsuccessful, he now asks the court to appoint an attorney for him.

As the Seventh Circuit has observed, there is no constitutional right nor statutory right to counsel in a civil case. Farmer v. Haas, 990 F.2d 319, 323 (7th Cir.), cert. denied, ____ U.S. ____, 114 S.Ct. 438 126 L.Ed.2d 372

(3 1993). In order for this court to request that an attorney represent an indigent party, the court must ascertain whether "the difficulty of the issues relative to the capabilities of the litigant would make it impossible for him to obtain any sort of justice without the aid of a lawyer..." Id. ,

The case before the court is brought pursuant to an alleged discrimination against the Plaintiff based on his race in violation of Title VII of the Civil Rights Act. The issues involved in this case are not so complex that it would be impossible for the Plaintiff to present his claim for discrimination. The Plaintiff has stated in his pleadings that he is an accountant, and presumably, therefore, he would be able to articulate requests for information from the Defendant in accordance with the Federal Rules of Civil Procedure, and [2]will be able to present his case based on the applicable law. In considering the Plaintiff's capabilities to obtain information and present his case vis-a-vis the kind of case that is before the court, the Plaintiff has not demonstrated to the court that this is the type of case which requires the appointment of counsel.

With respect to the Plaintiff's request for the waiver of fees for copies, the court again denies the motion. In his motion, the Plaintiff states that another district court provides indigent litigants with copies of all pleadings filed in their particular case. This is not, however, the practice of this court. Any pleadings filed by the opposing party must be served on the Plaintiff, and therefore the Plaintiff's concerns about not receiving pleadings are without merit. Moreover the court will mail to the Plaintiff copies of all orders entered in his case. The only pleading that the Plaintiff will not receive copies of are his own, and the court believes that the Plaintiff is capable of copying, either by rewriting them or by photocopy, which can usually be obtained in the private sector for about five cents per copy, so that he will be able to retain copies of his own pleadings.

Based on the foregoing, the Plaintiff's Motion for Appointment of Counsel, (Doc. 10) and the Plaintiff's Motion for Waiver of Fees for Copies, (Doc. 11), are denied.

IT IS SO ORDERED.

DATED: This 16 day of May 1994.

WILLIAM L. BEATTY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

KEITHIAN L. ARNOLD,]
]
Plaintiff]
]
]No. 94 94 WLB
-VS-]
]
BOATMEN'S NATIONAL BANK]
OF BELLEVILLE,]
Defendant]

ORDER

This matter is before the court on the Plaintiff's "Clarification of Background", (Doc. 14). This "Clarification seeks the reconsideration of the court's denial of appointment of counsel because the Plaintiff is not an accountant, as stated in the court's order, but rather, has a degree in accounting and has no experience in a business environment. The court construes this Clarification as a motion to reconsider the denial of counsel.

As the court previously observed, there is no constitutional right nor statutory right to counsel in a civil case. Farmer v. Haas, 990 F.2d 319, 323 (7th Cir.), cert. denied, ___ U.S. ___, 114 S.Ct. 438, 126 L.Ed.2d 372 (1993). In order for this court to request that an attorney represent an indigent party, the court must ascertain whether "the difficulty of the issues relative to the capabilities of the litigant would make it impossible for him to obtain any sort of justice without the aid of a lawyer..." Id.

As noted, the Plaintiff has advised the court that he only has a degree in accounting, and that he has never worked in accounting

nor held any positions in a business office. This fact, however, does not modify the court's previous assessment of the Plaintiff's ability to understand the case before the court and articulate his position. The Plaintiff has demonstrated through his pleadings that he has put forth his reasons for filing the lawsuit based on this theory of discrimination. The issues relative to the capabilities of the Plaintiff are not so difficult that the Plaintiff will be unable to obtain any sort of justice without the aid of a lawyer.

Based on the foregoing, the Plaintiff's Motion for Reconsideration of the denial of counsel, (Doc. 14) is denied.

IT IS SO ORDERED.

DATED: This 3 day of June, 1994

WILLIAM L. BEATTY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

KEITHIAN L. ARNOLD,]
]
Plaintiff]
]
]No. 94 94 WLB
-VS-]
]
BOATMEN'S NATIONAL BANK]
OF BELLEVILLE,]
Defendant]

ORDER

This matter is before the Court on Defendant's Motion for Enlargement of Time within which to file its Answer to the Complaint.

It is hereby ordered by the Court that Defendant's Motion for Enlargement of Time is granted. The Court directs the Clerk to file the Answer of defendant in the form attached to Defendant's Motion.

Dated this 21 day of July, 1994

William L. Beatty
U. S. District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

KEITHIAN L. ARNOLD,	]
	]
Plaintiff	]
	]
	] No.- 94 94 WLB
-VS-	]
	]
BOATMEN'S NATIONAL BANK	]
OF BELLEVILLE,	]
Defendant	]

ORDER

This matter is before the court on plaintiff's "Motion for Judgment by Default by Summons and Complaint." (Doc. 17). On July 21, 1994, the court granted defendant's "Motion for Enlargement of Time Within Which to File its Answer". Subsequently, defendant timely filed its answer. Consequently, plaintiff's Motion is rendered moot.

Plaintiff's "Motion for Judgment of Default by Summons and Complaint" (Doc. 17) is denied.

IT IS SO ORDERED.

DATED: This 18 day of August, 1994

WILLIAM L. BEATTY
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

KEITHIAN L. ARNOLD,]
]
Plaintiff]
]
]No. 94 94 WLB
-VS-]
]
BOATMEN'S NATIONAL BANK]
OF BELLEVILLE,]
Defendant]

ORDER

This matter is before the court on plaintiff's "Motion for Reconsideration" (Doc 26). Defendants have not filed a response to this motion.

Plaintiff had filed a motion for default judgment. On July 21, 1994, the court granted defendant an enlargement of time within which to file its answer. Defendant filed its answer within the time period designated in that order. Consequently, the court denied plaintiff's motion for default judgment.

Based upon the foregoing, plaintiff's "Motion for Reconsideration" (Doc. 26) is denied.

IT IS SO ORDERED.

DATED: This 22 day of September, 1994.

WILLIAM L. BEATTY
UNITED STATES DISTRICT JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

KEITHIAN L. ARNOLD,	]
	]
Plaintiff	]
	]
	]No. 94 94 WLB
-VS-	]
	]
BOATMEN'S NATIONAL BANK	]
OF BELLEVILLE,	]
Defendant	]

ORDER

This matter is before the court on plaintiff's "Second Motion for Reconsideration of Denial of Judgment by Default of Summons and Complaint" (Doc. 28). Defendant has not filed a response to this motion.

On July 15, 1994 plaintiff filed a motion for default judgment. In that motion, plaintiff alleged that the United States Marshal's Service return receipt indicated the summons and complaint were served on defendant on June 14, 1994. As of the date of plaintiff's motion for default judgment, defendant had not filed a responsive pleading.

On July 20, 1994, defendant filed a "Motion for Enlargement of Time Within Which to File its Answer and Defendant's Response to Plaintiff's Motion for Judgment by

APPENDIX H

Default." Defendant contended that the United States Marshal served the complaint on "an employee who was not an officer, managing agent, general agent or registered agent of Boatmen's and was not otherwise authorized by appointment to receive service. Consequently, service is ineffective." Defendant also contends it was not served with a copy of the summons. Apparently, the complaint was forwarded to the Human Resources and Employee Relations Manager of defendant. She was planning to resign her position on July 7, 1994, get married on July 9, and then move out-of-state. Contrary to defendant's standard practice, she did not forward the complaint to defendant's in-house counsel. Defendant contended this constituted "excusable neglect".

On July 21, 1994, the court granted defendant an enlargement of time within which to file its answer, and ordered the answer accompanying the enlargement request filed that same day. Consequently, the court denied plaintiff's motion for default judgment.

The entry of default under Rule 55(b) lies within the sound discretion of the court. **Midland Engineering Co. v. John A. Hall Const. Co., 398 F.Supp. 981, 987 (N.D.Ind.1975); Durling v. Markun, 231 F.2d 833 (7th Cir.), cert. denied, 352 U.S. 870, 77 S.CT. 96, 1 L.ED.2D 76 (1956).** Default judgments are governed by **Fed R. Civ. P. 55.** The preferred disposition of any case is upon its merits and not by default judgment. **Gomes v. Williams, 420 F.2D 1364, 1366 (10th Cir. 1970).** The court may consider the sums of money involved, whether material issues of fact are involved, whether the default is largely technical, whether the plaintiff has been substantially prejudiced by the delay involved, and whether the default was due to excusable neglect. **Midland, 398 F.SUPP. AT 987-88.** In the instant

case, the court found that plaintiff was not substantially prejudiced by the minimal delay involved in the filing of the defendant's answer.

Based upon the foregoing, the plaintiff's "Second Motion for Reconsideration of Denial of Judgment by Default of Summons and Complaint" (Doc. 28) is denied.

IT IS SO ORDERED.

DATED: This 21 day of October, 1994

WILLIAM L. BEATTY
UNITED STATES DISTRICT JUDGE
MEMORANDUM and ORDER

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

KEITHIAN L. ARNOLD,

Plaintiff

) No. 94-cv-0094 PER

V.

BOATMEN'S NATIONAL BANK OF BELLEVILLE,

Defendant

MEMORANDUM AND ORDER

Riley, District Judge:

Defendant's "Third Motion for Reconsideration of Denial of Judgment by Default" (Doc. #30) is now before the Court. Plaintiff Keithian Arnold commenced this action of February 4, 1994 and was granted permission to proceed *in forma pauperis* on March 2, 1994. Arnold moved for a default judgment (Doc. #17), and Judge William L. Beatty denied the motion as moot, noting that Defendant's answer had been timely filed. Arnold then filed two consecutive motions for reconsideration of the denial of default (Doc. #s 26 and 28). Judge Beatty denied both motions for reconsideration (Doc. #s 27 and 29). He recused himself from further proceeding in this matter on November 9, 1994 (Doc. #31).

Arnolds's Third Motion for Reconsideration levels harsh criticism at the Order denying his Second Motion for Reconsideration. Arnold characterizes that Order as having

"robbed" him of judgment by default. He also takes issue with, *inter alia*, the citation therein of **Midland Eng'g Co. v. John A. Hall Const. Co., 398 F.SUPP. 981, 987 (N.D. Ind. 1975).** He goes so far as to accuse the District Judge who authored that Order of having attempted to "deceive a *pro se* party into believing" the quote from that case was "a quote of the 7th Cir". - which it was not (Doc. # 30 at p. 5). Arnold's charges are unfounded.

It is the well-established law of the Seventh Circuit Court of Appeals that: "The decision to enter default lies within the district court's discretion." **O'Brien v. R.J. O'Brien & Assoc., Inc., 998 F.2d 1394, 1398 (7th Circ.1987). See also Colonial Penn Life. Ins. v. Assured Enterprises, Ltd. 151 F.R.D. 91, 93 (N.D. ILL. 1993).** Furthermore, the Seventh Circuit has explained that although district courts have a responsibility to enforce the finality of judgments (including default judgments, where appropriate), a default judgment remains a harsh sanction which should be employed only in extreme situations. **Ellingsworth v. Chrysler, 665 F.2d 180, 185 (7th Cir. 1981). Accord Stone-El v. Fairman, 785 F. SUPP. 711, 713 (N.D. Ill, 1991) ("defendant's actions fall far short of the extreme behavior justifying a default judgment").**

The case at bar did not present the extreme circumstances mandating entry of a judgment against Defendant by default. The Court's decision to deny default judgment is well supported by the applicable law, and Plaintiff's Third Motion for Reconsideration of Denial of Judgment by Default" is hereby **DENIED.**

IT IS SO ORDERED:

Dated: December 16 1994 _____

Paul E. Riley
District Judge

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

KEITHIAN L. ARNOLD,)
)
Plaintiff)
)
) Cause No. 94-cv-0094 PER
V.)
)
BOATMEN'S NATIONAL)
BANK OF BELLEVILLE,)
Defendant)

Memorandum and Order

Riley, District Judge:

I. INTRODUCTION

Plaintiff filed a complaint in this Court on February 4, 1994 alleging that Defendant, Boatmen's National Bank of Belleville ("BNB"), discriminated against him by failing to hire him due to his race (black) and his sex (male). Plaintiff further claims that BNB retaliated against him for filing a lawsuit against Boatmen's Trust Company ("Boatmen's Trust").[1] Plaintiff bases his claims on Title VII of the Civil Rights Act of 1964 (as amended), **42 U.S.C. 2000(e)** ("Title VII"), and **42 U.S.C. 1981**("Section 1981").

[1] BNB and Boatmen's Trust are both subsidiaries of Boatmen's Bancshares, Inc

This matter comes before the Court on two pending motions: (1) Plaintiff's motion for Reconsideration of Denial of Judgment by Default (Doc. 33) filed January 3, 1995; and (2) BNB's Motion for Summary Judgment (Doc. 36) filed January 25, 1995. This case is scheduled for final pre-trial conference on April 18, 1995 and set to commence trial on May 1, 1995.

II. MOTION TO RECONSIDER DENIAL OF DEFAULT

On July 15, 1994, Plaintiff moved for default judgment (Doc. 17). Judge William L. Beatty denied the motion as moot and noted that Defendant's answer had been timely .filed. Arnold then filed three consecutive motions for reconsideration of the denial of default (Docs. 26, 28, and 30). Judge Beatty denied the first two motions (see Docs. 27 and 29); this Court denied the third (see Doc. 32). Plaintiff has moved yet again for reconsideration.

For the reasons set forth in this Court's Order of December 20, 1994 (Doc. 32), the denial of default judgment was well-founded. The law of this Circuit is quite clear that the decision to enter default lies within the district court's discretion. ***O'Brien v. R.J. O'Brien & Associ., Inc.*, 998 F.2d 1394, 1398 (7th Cir. 1993).**

Moreover, Plaintiff misconstrues the narrow scope and purpose of a motion to reconsider Such motions "serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." ***Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985), quoting *Keene Corp. v. Int'l Fidelity Ins. Co.*, 561 F.Supp. 656, 665-66 (N.D. Ill. 1982), aff'd, 736 F.2D 388 (7th Cir. 1984).**

Plaintiff's fourth motion to reconsider, like his first three, neither identifies any clear error of law nor tenders any new evidence for this Court's consideration. For these reasons, Plaintiff's motion (Doc. 33) is hereby **DENIED.**

III. MOTION FOR SUMMARY JUDGMENT

A. Standard for Granting Summary Judgment

Summary judgment is proper where the pleadings and affidavits, if any, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." **Fed. Rule Civ. Procedure 56(c).** The movant bears the burden of establishing the absence of fact issues and entitlement to judgment as a matter of law. ***Yorger v. Pittsburgh Corning Corp.*, 733 F.2D 1215, 1218 (7th Cir. 1984).** **Accord** ***Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986).** The Court must view the evidence and all reasonable inferences therefrom in favor of the non-moving party. ***Matsushita*, 475 U.S. AT 588-89.**

In reviewing BNB's motion for summary judgment, the Court takes the evidence and all reasonable inferences in favor of Plaintiff, the non-moving party. Plaintiff, however, may not simply rest upon the allegations in his pleadings. Rather, Plaintiff must show through specific evidence that an issue of material fact remains on matters for which he bears the burden of proof at trial. ***Walker v. Shansky*, 28 F.3d 666, 670-71 (7th Circ. 1994),** ***citing Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).** "Furthermore, the evidence submitted in support of the nonmovant's position must be sufficiently

strong that a jury could reasonably find for [him]." ***Id.***, **citing *Brownell v. Figel*, 950 F.2D 1285, 1289 (7th Cir. 1991).**

As is further described below, BNB has met its initial burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. In response to BNB's motion, Plaintiff has failed to sustaIn his burden of demonstrating a traible issue of fact. Nor has he come forward with evidence sufficiently strong to support a jury verdict in his favor.

B. Analysis of Plaintiff's Claims

Plaintiff's central contention is that BNB discriminated against him in failing to hire him for (a) an entry level accounting position or (b) *any* position from March 1989 until January 1993 (Doc. 1, 13). As an initial proposition, the Court acknowledges the well-established rule that *pro se* complaints, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." ***Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Accord *Caldwell v. Miller*, 790 F.2D 589, 594 (7th Cir. 1986).** Although Title VII and 1981 differ in the kind of discrimination they prescribe, both statues require proof of intentional discrimination, the "methods of proof and elements of the case are essentially identical" under both statutes. ***Von Zuckerstien v. Argonne National Laboratories*, 984 F.2D 1467, 1472 (7th Cir. 1993).** Even affording his pleadings a liberal construction, Plaintiff has not established a *prima facie* case of discrimination resulting from BNB's failure to hire him for an entry level accounting position.

In a discrimination action alleging disparate treatment of a single employee and proceeding via indirect proof of such discrimination, a plaintiff must show four things by a

preponderance of the evidence

"(1) that the plaintiff belongs to a protected group (2) that the plaintiff... applied for the new job, and was qualified for the new job; (3) that the plaintiff was rejected despite the plaintiff's qualifications; and (4) that the employer hired someone outside the protected group." ***Kirk v. Federal Property Mgt Corp.*, F.3d,135, 138 (7th Cir. 1994) (omitting citations).** 2

BNB concedes the first element delinated above -- that Plaintiff is a member of a protected group [3]. (Doc. 37 at p. 7). Plaintiff has not, however, proffered evidence that he was *qualified* for the position he sought or that he was rejected *despite* his qualifications. Plaintiff has offered scant evidence of his qualification for the BNB positions--he had not worked since 1987, and he had no experience in banking, accounting or business. Moreover, a plaintiff must demons

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[2] This test has also been articulated to include the following fourth element: "that, after [plaintiff's] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. " ***Texas Dep't of Community Affirs v. Burdine*, 450 U.S. 248, 253-54. See also *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993).** Plaintiff also fails to meet prong four under this formulation.

[3] The Title VII "protected group" concept originally referred only to racial minorities, but has been expanded. ***Kirk* at 138, citing *McDonnel Douglas Corp. V. Green*, 411 U.S. 792 (1973).**

trate that he "was rejected under circumstances which *give rise to an inference of unlawful discrimination.*" ***Burdine*, 450 U.S. at 253 (1981) (emph. added).** In the case at bar, Plaintiff plainly falls short of illustrating facts from which one can infer unlawful discrimination.

The facts established by the pleadings, documents and affidavits submitted to the Court reveal the following. Plaintiff first submitted an application for employment to BNB on August 24, 1989 for the position of "auditor/accountant." That application ("Application 1") was renewed on November 29, 1989 and thus remained "active" until February 28, 1990. 4 Between August, 24, 1989 and February 29, 1990, BNB had no opening for an entry level accountant or auditor.

Plaintiff submitted a second application on October 9, 1990 and renewed this application on January 11, 1991 and on April 4, 1991 ("Application 2"). Application 2 was active from October 9, 1990 until July 4, 1991. About eight days prior to Plaintiff's submission of Application 2, BNB filled an "Accounting Clerk" opening. Only qualified *internal* candidates were considered for the position. The person hired had worked for BNB for ten years. BNB's express policy is to fill openings from within the company whenever possible (see BNB'S Human Resources Guidelines; Tab D to Doc. 37).

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4 BNB'S form application states: "The application will be kept active for three months and it must be re newed to be active for a longer period." BNB does not consider applications older than three months which have not been renewed; such applications are considered "inactive" Terveer Affidant at 7).

On July 15, 1992, Plaintiff submitted a third application ("Application 3") and renewed that application on October 15, 1992. Application 3 was active from July 15, 1992 until January 15, 1993). During that time, no entry level auditor or accountant was hired. Between the time that Application 2 became inactive and the time that Application 3 was submitted, BNB filled an accounting clerk position *internally* by hiring a qualified employee who had worked for BNB for nearly three years. The positions filled by BNB during the *active* period of Application 3 were all positions outside the accounting field.

Thus Boatmen's filled two entry level accounting positions from March 1989 through January 1993. Both positions were filled internally; Boatmen's sought outside applicants for neither position. Furthermore, at the time each position was filled, Plaintiff's applications were "inactive." These facts offer no support for Plaintiff's claim that BNB discriminated against him in failing to hire him into an *entry level accounting position.* [5]

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5 Even if Plaintiff *had* established his *prima facie* case of discrimination, his claims must fail because he has not rebutted the legitimate, nondiscriminatory reasons which support BNB's hiring decisions. The affidavits and documents submitted by BNB with its motion amply buttress BNB's position that polaintff's skills and work experienced were inferior to those of the persons hired for the open positions. Such consider ations are both legitimate and non-discriminatory.

Similarly unable to survive summary judgement is Plaintiff's claim that BNB refused to hire him for *any* position from March 1989 until January 1993. Plaintiff did not raise this claim in his Charge of Discrimination field with the EEOC, and the EEOC did not consider or investigate this claim. The filing of a charge with the EEOC is a prerequisite to commencement of a Title VII suit in United States District Court. ***Rush v. McDonald's Corp.*, 966 F.2D 1104, 1110 (7th Cir. 1992).** The scope of the subsequent judicial proceeding is limited by the scope of the charges filed with the EEOC, and a party cannot "seek judicial relief for different instances of discrimination." ***Id.*** This restriction is based on the goal of affording the agency and the employer an opportunity to attempt conciliation without resort to the courts. ***Id.*** Application of these principles leads to the conclusion that Plaintiff's claims regarding BNB's alleged failure to hire him for any position between March 1989 and January 1993 are not properly before this Court, and they merit dismissal.[6]

C. Conclusion

No genuine issue of material fact remains for trial, and Defendant BNB is entitled to judgment as a matter of law. Therefore, the Court hereby **GRANTS** Defendant

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[6] Finally, Plaintiff's claim that BNB retaliated against him because he filed an EEOC charge and lawsuit against Boatmen's Trust also fails. BNB correct notes in its memo (Doc. 37 at p. 13) that Plaintiff has come forward with no evidence of discrimination by BNB, much less any causal connection between such discrimination and Plaintiff's filing of claims against Boatmen's Trust.

Boatmen's Motion for Summary Judgment (Doc. 36). The Clerk of the Court is directed to enter judgment in favor of Boatmen's National Bank and against Plaintiff on Plaintiff's Complaint.

IT IS SO ORDERED.

Dated this 14 day of April, 1995.

Paul E. Riley
United States District Judge

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

July 30, 1996

HON. WALTER J. CUMMINGS, Circuit Judge

HON. WILBUR F. PELL, JR., Circuit Jugdge

HON. JOEL M. FLAUM, Circuit Judge

KEITHIAN L. ARNOLD
Plaintiff- Appellant

No. 95-2223 v.

BOATMEN'S NATIONAL BANK OF BELLEVILLE,
Defandant-Appelle.

] Appeal from the United
] States District Court for
] the Southern District of
] Illinois, East St. Louis
] Division
]
] No. 94 C 94
]
] Paul E. Riley
] Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above -entitled cause on July, 9, 1996, by plaintiff-Aappellant no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing in banc be, and the same is hereby DENIED.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

KEITHIAN L. ARNOLD,	]
	]
Plaintiff	]
	]
	]No. 94 94 WLB
-VS-	]
	]
BOATMEN'S NATIONAL BANK	]
OF BELLEVILLE,	]
Defendant	]

DEFENDANT'S MOTION FOR ENLARGEMENT OF TIME WITHIN WHICH TO FILE ITS ANSWER AND DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR JUDGMENT BY DEFAULT

Defendant Boatmen's National Bank of Belleville ("Boatmen's"), moves herein for an order pursuant to Rule 6 of the Federal Rules of Civil Procedure enlarging the time within which defendant is to file its Answer to the Complaint herein and further granting defendant leave to file its Answer in the form attached hereto as Exhibit A. In support of this Motion, Boatmen's states as follows:

1. Based on the Court file, a copy of which was obtained by defendant's counsel this date, plaintiff presented to the Clerk of the Court for filing on February 4, 1994, a two-page handwritten pro se Complaint against Boatmen's. That same date, plaintiff filed a Motion to Proceed In Forma Pauperis and an affidavit in support of that motion.

2. On March 2, 1994, plaintiff was granted leave to

proceed in forma pauperis by Judge William L. Beatty. Thereafter, plaintiff filed a "Motion for Marshall Services" and said motion was granted by United States Magistrate Judge Gerald B. Cohn on May 25, 1994.

3. On June 14, 1994 a United States Marshall serviced a copy of the Complaint, but not the Summons, on Bonnie McCurly, an employee at Boatmen's. Boatmen's never received a copy of the Summons. Ms. McCurly is not an officer, managing agent, general agent or registered agent of Boatmen's nor is she authorized by appointment to receive service.

4. At some point thereafter, the specific date unknown, the handwritten Complaint was forward to Kathryn A. Heth at Boatmen's Bancshares, Inc. The Boatmen's National Bank of Belleville is a wholly owned subsidiary of Boatmen's Bancshares, Inc. At that time, Kathryn Heth was the Community Banks Human Resources and Employee Relations Manager.

5. At the time she received the Complaint, Kathryn Heth had decided to resign her position at Boatmen's Bancshares, Inc. and was preoccupied with that process. Ms. Heth did in fact resign effective July 7, 1994. Ms. Heth also got married on July 9, and was planning to relocate to another state shortly thereafter.

6. Kathryn Heth did not forward a copy of the Complaint to the in-house Human Resources Counsel at Boatmen's Bancshares, Inc., as was the established policy and practice at the Holding Company.

7. Human Resources Counsel first became aware of the instant Complaint on July 19, 1994 at approximately 4:00 p.m. when she received a copy of a motion filed by the plaintiff seeking judgment against Boatmen's by default. At that time, Human Resources Counsel made further investigation with the Human Resources Department and obtained a

copy of the Complaint. A copy of the Complaint was immediately forwarded to the undersigned counse

8. Assuming for purposes of this motion only that service was properly obtained on June 14, 1994, Boatmen's responsive pleading was due July 5, 1994.[1] Boatmen's now seeks leave to file its Answer fifteen (15) days after the Answer was due and one (1) day after the Complaint came into the hands of Boatmen's in-house counsel.

LEGAL DISCUSSION

9. Pursuant to Rule 6, F.R.C.P., the Court may exercise its discretion to enlarge the time period within which Boatmen's can file its Answer upon a showing of excusable

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[1] As mentioned above, Boatmen's first became aware of the Compalint when in-house counsel received a copy of Plaintiff's Motion for Judgment by Default. In essence, the motion asserts that Boatmen's failed to respond to the Summons and Complaint within the time prescribed. In response, Boatmen's states that the Complaint was served upon an employee who was not an officer, managing agent, general agent or registered agent of Boatmen's and was not otherwise authorized by appointment to receive service. Consequently, service is ineffective. See United States v. Mollenhauer Laboratories, Inc., 267 F.2d, 260, 262 (7th Cir. 1959); Mo. 1981); Free State Receivables v. Claims Processing, etc., 76 F.R.D. 85, 87 (D. MD. 1977). In addition, a copy of the Summons was apparently never served upon Boatmen's. Boatmen's acknowledges at this time that it has received a copy of the Complaint and, if leave is granted, will file an Answer, thereby obviating the need for this Court to decide the service of process issue.

neglect. F.R. Civ. P. 6(b)(2). Fidelity Federal Sav. & Loan Assn. v. Felicetti, 148 F.R.D. 532, 533 (E.D. Pa. 1993) Further, Rule 1 of the Federal Rules states that "[the rules] shall be construed to secure the just, speedy and inexpensive determination of every action." In accordance with that mandate, courts generally have given a liberal interpretation to Rule 6(b) in order to work substantial justice and allow a party its day in court. Anderson v. Stanco Sports Library, Inc., 52 F.R.D. 108, 110 (D.S.C. 1971).

10. In this case, there is a reasonable explanation and excuse for the failure of Boatmen's to act within the prescribed time. The Complaint ultimately fell into the hands of an employee at Boatmen's Bancshares, Inc. who was resigning her position, planning for a wedding and preparing to relocate to another state. Unfortunately, she did not recognize the significance of the two page handwritten Complaint. In addition, the Summons, containing the time requirements for a responsive pleading was not in her possession. Given her preoccupation with personal matters and pending resignation, it is reasonable under the circumstances to excuse Ms. Heth's conduct in not forwarding a copy of the Complaint to Human Resources Counsel at Boatmen's Bancshares.

11. In addition, plaintiff will not be prejudiced by this Court's granting Boatmen's Motion for Enlargement of Time. The Complaint was originally presented to the Clerk in February, 1994 and Summons was not issued until May 25, 1994. The enlargement of time sought by Boatmen's is minimal (15 days), and Boatmen's has acted expeditiously and diligently since in-house counsel because aware of the Complaint on July 19, 1994. Boatmen's failure to act in this matter cannot be attributed to a disregard for the process of this Court or indeed as anything more than excusable neglect.

12. In the interest of justice, the motion of defendant Boatmen's for an extension of time to file its Answer should

be granted.

WHEREFORE, defendant requests an order granting an enlargement of time within which to file its Answer in the form attached hereto as Exhibit A, or in the alternative, for an order denying plaintiff's Motion for Default and declaring service of process to be ineffective.

LEWIS, RICE & FINGERSH

By _____
Joseph E. Martineau
John J. Moellering
Robert J. Golterman

500 North Broadway, Suite 2000
St. Louis, Missouri 63102
314/444-7600

Attorneys for Defendant

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a true and correct copy of the foregoing was served upon plaintiff via first-class U.S. Mail, postage prepaid this 20 day of July, 1994 addressed as follows: Keithian L. Arnold, 3741 Converse Avenue, Alorton, Illinois 62207-1508.

_____

PERTINENT RULES

1. Federal Rules of Civil Procedure:

Rule 6. Time

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion

(2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect;

Rule 12. Defenses and Objections-When and How Presented-By Pleading or Motion-Motion for Judgment on the Pleadings

(a) When Presented.

(1) Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer

(A) within 20 days after being served with the summons and complaint, or

Rule 54. Judgments; Costs

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.

Rule 55. Default

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment. Judgment by default may be entered as follows:

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor;...

(d) Plaintiff's Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who

has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

2. Summons In A Civil Action:

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon PLAINTIFF'S ATTORNEY an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

3. Statutes

42 U.S.C. §1981. Equal Rights Under The Law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as

is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §2000e-2. Unlawful Employment Practices

(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if-

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(m) Except as otherwise provided in this title [42 USCS §§2000e et seq.], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion,

sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.